

REMARKS

The Office Action dated July 21, 2003, has been received and carefully noted. The preceding amendments and the following remarks are submitted as a full and complete response thereto. Claims 1, 9 and 17 have been amended. Support for the amendments can be found at page 5, line 27 to page 6, line 8. No new matter has been added. Accordingly, claims 1-32 are pending in this application and are submitted for consideration.

Claim 10 was objected to under 37 C.F.R. § 1.75, as being a substantial duplicate of claim 9. Claim 9 is amended to depend upon claim 1, instead of from claim 4. Thus, claims 9 and 10 recite a different scope of the invention and are distinct from one another. Accordingly, Applicants request that the objection be withdrawn.

Claims 1-32 were rejected under the judicially created doctrine of obviousness-type double patenting over U.S. Patent No. 6,581,341 ("341 patent"), in view of a secondary reference, U.S. Patent No. 3,891,007 to Kleyhamp ("007 patent"). Applicants respectfully traverse the rejection and submit that the rejection is improper.

Obviousness type double-patenting is evaluated under the same standards as a rejection under 35 U.S.C. § 103. See, MPEP § 804. Here, the combination of cited prior art cannot be properly combined to derive the present invention and does not suggest each and every element of the claims of the present invention.

Independent claims 1 and 17, upon which claims 2-10 and 18-26 respectively depend, recite a spacer or window assembly including a flexible, hollow spacer. Independent claims 11 and 27, upon which claims 12-16 and 28-32 respectively depend, recite a spacer or window assembly that includes a ribbed tube.

The '341 patent claims are directed to a spacer and sealant assembly. The spacer includes a support member having a planar surface bounded by first and second edges, at least one of the first and second edges having a pleated portion, and an undulating shim in contact with the support member such that the pleated portion fits inside of the undulating portion of the shim. See, e.g., claim 1 of '341 patent. The spacer includes sealant joining the first and second edges. Fig. 2 of the '341 patent exemplifies the claimed embodiment. In Fig. 2, a sinusoidal shim is disposed between two pleated support members, such that the pleats fit inside a half-wave of the shim. Thus, the claims of the '341 patent do not recite or suggest a flexible, hollow spacer as defined by 1-10 and 17-26.

As is admitted in the Office Action, the '341 patent does not claim the spacer as being a ribbed tube. Moreover, the '341 patent neither discloses, suggests nor claims a flexible, hollow spacer. The spacer disclosed and claimed in the '341 patent has a metal shim disposed in the core of the spacer to give the spacer rigidity. Thus, the '341 patent claims fail to show or suggest each and every element of the claims of the present invention.

The '007 patent is not a spacer and therefore does not make up for the deficiencies of the '341 patent. With respect to those claims of present application that recite the limitation that the spacer section is a ribbed tube (claims 11-16 and 27-32), there would have been no motivation or suggestion to combine the teachings of the '341 and '007 patents – that is, to add the corrugated tube of the '007 patent to the '341 patent. It is unclear whether a corrugated tube could even be added to the spacer claimed in the '341 patent since the shim is disposed in the core and the edges are pleated. Moreover, it is unclear whether a ribbed tube would provide the same structural rigidity as a metal shim, and therefore, modifying the invention of the '341 patent as such would defeat the purpose that the shim provides in the claims of the '341 patent- longitudinal stability and crush resistance. See '341 patent at column 2, lines 20-60, column 3, lines 35-37, and column 3, lines 59-63. Thus, Applicants submit that the '341 and '007 patents cannot be combined for the purpose of deriving the present invention, and the rejection is improper. Accordingly, Applicants request that the rejection of claims 1-32 be withdrawn and claims 1-32 be allowed.

Since all objections and rejections have been satisfactorily addressed herein, Applicants therefore request that each of claims 1-32 be found allowable, and this application passed to issue.

If for any reason the Examiner determines that the application is not now in condition for allowance, it is respectfully requested that the Examiner contact, by telephone, the Applicants' undersigned attorney at the indicated telephone number to arrange for an interview to expedite the disposition of this application.

In the event that this paper is not timely filed, Applicants respectfully petition for an appropriate extension of time. Any fees for such an extension together with any additional fees may be charged to Counsel's Deposit Account No. 02-2135.

Respectfully submitted,

By 

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